INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	13

CITATIONS

Cases:

Association of American Physicians and Surgeons v. *Weinberger*, 395 F. Supp. 125, affirmed, November 18, 1975 (No. 75–361)	7
Grand Trunk Western Ry. Co. v. *United States*, 252 U.S. 112	7
Gratiot v. *United States*, 15 Pet. 336	7
Heidt v. *United States*, 56 F. 2d 559, certiorari denied, 287 U.S. 601	7
McKnight v. *United States*, 98 U.S. 179	7
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	9–10
United States v. *Bank of the Metropolis*, 15 Pet. 377	7
United States v. *Carr*, 132 U.S. 644	6
United States v. *Munsey Trust Co.*, 332 U.S. 234	7

204-004—76——1

Cases—Continued Page

United States v. *Paddock*, 178 F. 2d 394, rehearing denied, 180 F. 2d 121, certiorari denied, 340 U.S. 813 ---------- 7

United States v. *Wurts*, 303 U.S. 414 ---------- 7

Weinberger v. *Salfi*, 422 U.S. 749 ---------- 5

Wisconsin Central Railroad Co. v. *United States*, 164 U.S. 190 ---------- 7

Statutes and regulations:

False Claims Act, 12 Stat. 698, 31 U.S.C. 231 ---------- 8

Medicaid Act, as added, Section 1903(j), 86 Stat. 1396, 42 U.S.C. (Supp. IV) 1396b(j) ---------- 9

Social Security Act, 49 Stat. 620, as added by the Health Insurance for the Aged Act, 79 Stat. 290, as amended by the Social Security Amendments of 1972, 86 Stat. 1329:

Section 205(h), 42 U.S.C. 405(h) ---- 5

Section 1814(a), 42 U.S.C. 1395f(a) -- 10

Section 1814(b), 42 U.S.C. (Supp. IV) 1395f(b) ---------- 3

Section 1815, 42 U.S.C. 1395(g) - 2, 3, 6, 10, 13

Section 1816, 42 U.S.C. (Supp. IV) 1395h ---------- 2

Section 1817, 42 U.S.C. (Supp. IV) 1395i ---------- 2

Section 1862(a), 42 U.S.C. 1395y(a) -- 2, 7

Section 1866, 42 U.S.C. (Supp. IV) 1395cc ---------- 2, 10

Section 1866(a), 42 U.S.C. (Supp. IV) 1395cc(a) ---------- 9, 13

Section 1869, 42 U.S.C. (Supp. IV) 1395ff ---------- 10

Statutes and regulations—Continued Page
Section 1870, 42 U.S.C. 1395gg 8
Section 1870(b), 42 U.S.C. 1395gg(b) .. 8
Section 1870(b), 42 U.S.C. (Supp. IV) 1395gg(b) 11
Section 1872, 42 U.S.C. (Supp. IV) 1395ii 5
Section 1879, 42 U.S.C. (Supp. IV) 1395pp 10
20 C.F.R. 405.372 5
Miscellaneous:
S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972) 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1041

MT. SINAI HOSPITAL OF GREATER MIAMI, INC.,
PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 517 F. 2d 329. The opinion of the court denying rehearing (Pet. App. 27a-28a) is reported at 522 F. 2d 179. The opinion of the district court (Supplemental Appendix to the petition) is reported at 376 F. Supp. 1099.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1975. A timely petition for rehearing was denied on November 3, 1975. The petition for a

writ of certiorari was filed on January 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Health, Education, and Welfare may recoup payments made to a medicare provider for services subsequently determined to have been unnecessary and not covered by the Act.

STATUTES INVOLVED

Section 1815 of the Social Security Act, as added, 79 Stat. 297, 42 U.S.C. 1395g, and the relevant portions of Section 1866 of the Act, as amended, 86 Stat. 1394, 42 U.S.C. (Supp. IV) 1395cc, are set forth in the App., *infra,* pp. 13–14. The other relevant sections of the Act are set forth at Pet. App. 29a–38a.

STATEMENT

1. The Health Insurance for the Aged Act ("Medicare"), 42 U.S.C. 1395 *et seq.*, was enacted in 1965 in part to provide federal funding of the cost of certain hospital services afforded many individuals aged 65 and over. The Secretary of Health, Education, and Welfare, normally acting through private organizations, called "fiscal intermediaries," reimburses participant hospitals, called "providers," for the services they provide to eligible medicare beneficiaries. 42 U.S.C. (Supp. IV) 1395h and 1395i. Only bills in respect of services that were "reasonable and necessary for the diagnosis or treatment of illness or injury * * *" (42 U.S.C. 1395y(a)(1)) are subject to reimbursement. Moreover, reimbursement is limited to

the "reasonable cost" of the services. 42 U.S.C. (Supp. IV) 1395f(b).

In order to accommodate providers' cash flow requirements, the Act provides for reimbursement on an interim, pre-audit basis, not less often than monthly. 42 U.S.C. 1395g. The interim payments are based upon billings from the provider that have been preliminarily determined by the Secretary or a fiscal intermediary to contain charges for the reasonable cost of providing services covered by the Act. At the close of a provider's fiscal year, the Secretary undertakes an audit to determine the actual amount of reimbursement to which the provider was entitled for that year. If the audit reveals that the interim payments made during the fiscal year exceeded the amount to which the provider was entitled, the Secretary adjusts the provider's current interim reimbursement in order to recoup the excess payments. 42 U.S.C. 1395g.

2. Petitioner, Mount Sinai Hospital of Greater Miami, participates in the medicare program as a provider of services. In early 1972, petitioner's fiscal intermediary, respondent Blue Cross of Florida, Inc., determined to investigate allegations that petitioner had received payment under the Act for services that were not medically necessary. As a result of a preliminary review undertaken in June 1972, Blue Cross determined that a more detailed audit was required (J. App. 93–94).[1] Blue Cross and petitioner agreed that the audit would be conducted by reviewing patient

[1] "J. App." refers to the Joint Appendix to the briefs filed in the court of appeals.

records for a representative year and applying the statistical results of that review to the years 1966 through 1971 (J. App. 94–95, 109–110).

The patient records for the representative year were reviewed twice under the auspices of the Peer Review Committee of the Florida Medical Foundation, an affiliate of the Florida Medical Association (J. App. 95, 96). Some 45 physicians, divided according to specialty into groups of three or four, were presented with the charts of patients who had received care in the group's area of expertise (J. App. 95–96). If all physicians in the reviewing group agreed that the services rendered to a patient were medically unnecessary, they made a recommended finding to that effect (J. App. 96).

On March 23, 1973, Blue Cross notified petitioner that, on the basis of the recommendations of the Peer Review Committee, it had determined that approximately $6 million of petitioner's reimbursed services had been medically unnecessary and that it proposed to institute suspension of 15% of the current amounts due petitioner until the $6 million in overpayments had been recouped (J. App. 97). After two meetings between petitioner and Blue Cross (J. App. 98, 118), and consideration of two written statements submitted by petitioner (J. App. 99, 101), Blue Cross prepared a written statement containing specific findings and conclusions as to the existence of an overpayment and the need for a 15% suspension of current payments due petitioner to protect the medicare program against financial loss (J. App. 105–106; see 20 C.F.R. 405.372).

3. Petitioner thereupon instituted this action in the United States District Court for the Southern District of Florida, contending, *inter alia,* that the Secretary lacked statutory authority to recoup payments made for services subsequently determined not to have been covered by the Act and that, in any event, the suspension of current payments constituted a denial of due process.

The district court denied the government's motions to dismiss and for summary judgment, and granted petitioner's motion for summary judgment on the ground that the Secretary lacked authority to recoup payments erroneously made for services subsequently determined to have been medically unnecessary (Pet. Supp. App. 47a, 68a).[2] The court reasoned that Congress had expressly authorized recoupment of payments in excess of the "reasonable cost" of the services rendered and therefore must be presumed to have withheld authorization to recoup other erroneous payments (Pet. Supp. App. 50a–55a, 64a–65a). The court therefore did not reach petitioner's due process claim (Pet. Supp. App. 68a).

The court of appeals reversed. The court held that the Secretary had a common-law right to recoup payments erroneously paid by him for non-covered serv-

[2] In the motion to dismiss, the government contended, *inter alia*, that the court lacked subject matter jurisdiction over the lawsuit. The argument was based primarily on Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), incorporated by reference in the Medicare Act (42 U.S.C. 1395ii), which states that no decision of the Secretary shall be reviewed except as provided by the Act. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749.

ices, finding both in the Medicare Act and its 1972 amendments an understanding on the part of Congress that the Secretary had such a right (Pet. App. 12a–24a). The court remanded the case to the district court for consideration of petitioner's other claims (Pet. App. 26a).

ARGUMENT

The decision below is correct and no further review is warranted. The Secretary's common-law right to recoup monies erroneously paid is well established, and nothing in the Medicare Act either expressly or by implication abrogates that right. There is no conflict among the courts of appeals on the issue.[3]

1. As both courts below recognized (Pet. App. 8a–9a; Pet. Supp. App. 48a), the government has inherent authority to recover funds illegally or erroneously paid.[4] *E.g., United States* v. *Carr*, 132 U.S. 644; *Wisconsin Central Railroad Co.* v. *United States*,

[3] Moreover, petitioner's other claims have been remanded for consideration by the district court; determination of those claims in petitioner's favor in the district court might render moot the principal question raised by petitioner here. Although petitioner seeks to raise those other claims here as well (Pet. 30–32), since they have not yet been considered by the lower courts they are plainly not ripe for review.

[4] The court of appeals rejected the government's contention that Section 1815 of the Social Security Act, 42 U.S.C. 1395g, affirmatively authorizes the Secretary to recoup payments for non-covered services (Pet. App. 6a–7a). That provision entitles the Secretary to adjust current payments "on account of previously made overpayments or underpayments * * *," without distinguishing among various kinds of overpayments; yet the court of appeals held that Section 1815 applies only to payments in excess of the reasonable cost of services. It is the government's position that Section 1815 authorizes the recoupment at issue here. However, as an alternative, the government supports the reasoning of the courts of appeals

164 U.S. 190; *Heidt* v. *United States*, 56 F. 2d 559, 560 (C.A. 5), certiorari denied, 287 U.S. 601; *United States* v. *Paddock*, 178 F. 2d 394, 396–397 (C.A. 5), rehearing denied, 180 F. 2d 121, certiorari denied, 340 U.S. 813. The United States may exercise this right by deducting or withholding the amount of the overpayment from other sums due to the recipient. *E.g.*, *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239–240; *Gratiot* v. *United States*, 15 Pet. 336; *McKnight* v. *United States*, 98 U.S. 179, 186; *Wisconsin Central Railroad Co.* v. *United States*, *supra*.

The right of recoupment is independent of statute. *E.g.*, *United States* v. *Wurts*, 303 U.S. 414, 416; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U.S. 112, 121; *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 401. It is abrogated only where Congress has clearly manifested its intention to do so. *United States* v. *Wurts*, *supra*.[5]

The Medicare Act evinces a congressional understanding that the Secretary would retain the common-law right of recoupment. Section 1870 of the Act, 42

---

that the Secretary's common-law right of recoupment has not been abrogated by the Medicare Act.

[5] Petitioner contends (Pet. 29–30) that even if the Secretary possessed the common-law right to recoup funds paid under the Medicare Act, the right is not applicable here since the right does not apply to payments made as the result of an error in judgment. However, as the court of appeals correctly noted (Pet. App. 9a–10a), the Medicare Act expressly prohibits payments for services which are not medically necessary. 42 U.S.C. 1395y(a)(1). The determination whether payment has been made in violation of this prohibition is to be made by the Secretary. See *Association of American Physicians and Surgeons* v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.), affirmed, November 18, 1975 (No. 75–361).

U.S.C. 1395 gg, prior to its amendment in 1972 (see p. 11, *infra*) authorized the Secretary to recoup from a beneficiary an overpayment made to a provider, but only when "the excess * * * amount cannot be recouped from [redacted] such provider of services * * *." 42 U.S.C. 1395gg(b)(1).[6] As the court of appeals demonstrated (Pet. App. 12a–18a), this provision is premised upon the existence of authority in the Secretary to recoup funds paid to a provider. Petitioner contends (Pet. 28–29) that Section 1870 is limited to the recovery of payments made in excess of the reasonable cost and does not extend to payments erroneously made for non-covered services.[7] But the statute explicitly refers to any situation "[w]here * * * more than the correct amount is paid under this [Act] * * *." Nothing in this language distinguishes between unreasonable costs and unnecessary services.

This view of the congressional understanding is confirmed by the 1972 amendments to the Medicare Act, which, *inter alia,* bar a provider from charging beneficiaries, not themselves at fault, for services determined by the Secretary, more than three years after the original payment to the provider, not to

[6] Petitioner contends (Pet. 28) that Section 1870 applies only to claims other than those arising under the Medicare Act, *e.g.*, the False Claims Act, 31 U.S.C. 231. Nothing in the language or history of the Act supports this contention.

[7] Under petitioner's theory, if the Secretary pays a claim of two dollars for two doses of medication furnished to a beneficiary, he can recoup one dollar from the provider if he subsequently determines that one dollar represents the "reasonable cost" of the medication but not if he determines that one of the doses was not medically necessary.

have been covered by the Medicare Act. 42 U.S.C. (Supp. IV) 1395cc(a)(1)(B). As the court of appeals correctly pointed out (Pet. App. 21a):

> This kind of protection would not be necessary unless (1) providers could be required to reimburse HEW for money received in payment for non-covered services, and (2) the determination of non-coverage could be made after the original [prepayment] determination * * *, indeed, more than three years after that determination.

Although the 1972 amendments were enacted after the years in issue here,[8] they are probative of Congress' understanding of the Secretary's recoupment right under the Medicare Act. The amendments and their legislative history (see, *e.g.*, S. Rep. No. 92–1230, 92d Cong., 2d Sess. 313 (1972), quoted from at Pet. App. 19a) indicate that Congress assumed that providers were liable to the Secretary for payments erroneously made for non-covered services.[9] This congressional understanding is entitled to "great weight" in construing the statute. *Red Lion Broadcasting Co.* v.

[8] Thus to the extent that petitioner might claim that the 1972 amendments enlarged the Secretary's recoupment rights, this case would lack prospective importance, for it would relate only to recoupment rights with regard to pre-1972 overpayments.

[9] In 1972, Congress also amended the Medicaid Act to provide that the Secretary could order a cessation of payments to a hospital under that Act if the hospital has terminated its participation in the medicare program and the Secretary is unable to recover an overpayment made to the hospital under the Medicare Act. 42 U.S.C. (Supp. IV) 1396b(j)(2)(B)(i). This further indicates that Congress understood the Secretary to possess the right to recoup overpayments by withholding equivalent sums from amounts currently due.

Federal Communications Commission, 395 U.S. 367, 380–381.

2. Petitioner contends that the right of recoupment conflicts with Section 1869 of the Act, 42 U.S.C. (Supp. IV) 1395ff (Pet. 23–27), and is harsh in operation (Pet. 15–19).

a. Section 1869 of the Act merely establishes procedures by which a beneficiary may contest the Secretary's decision that a service provided to the beneficiary was not covered under the Act.[10] Petitioner argues that the existence of such procedures, which could be invoked, for example, when a fiscal intermediary refused payment of a claim initially, precludes recoupment of erroneous payments of claims. But the fact that a beneficiary is entitled to review when the Secretary refuses to pay a claim in the first instance is in no way inconsistent with the Secretary's right to recoup money that he subsequently discovers to have been erroneously paid.[11] The Act explicitly contemplates post-payment reconsideration of the correctness of payments (see, *e.g.*, 42 U.S.C. 1395g and (Supp. IV) 1395cc), and petitioner's argument to the contrary is insubstantial (see Pet. App. 17a–18a). Moreover,

[10] Congress has now granted providers standing to participate in the administrative proceedings and a limited right to judicial review. 42 U.S.C. (Supp. IV) 1395pp.

[11] Petitioner incorrectly contends (Pet. 22–23) that the decision of the court of appeals is inconsistent with 42 U.S.C. 1395f(a)(7), which permits payment for certain unnecessary services for a limited grace period. Although that provision may bar recoupment of particular payments made with respect to certain unnecessary services, by preventing such payments from being treated as overpayments under the Act, it obviously does not affect the Secretary's right to recoup overpayments not so protected.

petitioner's argument that the Secretary is irrevocably bound by the initial decision to make interim reimbursement would, if sustained, enormously increase both the potential for abuse and the difficulty of making initial determinations.

b. Petitioner also contends that providers should not be subject indefinitely to the possibility of recoupment. That, however, is a matter for Congress to consider, as it evidently did in 1972 in providing that recoupment is permissible only when the provider was not without fault and that the provider is rebuttably presumed to be without fault when the determination of overpayment is made more than three years after payment. 42 U.S.C. (Supp. IV) 1395gg(b); see Pet. App. 18a, n. 22. Congress did not, however, choose to abrogate the government's right under common law to recoup erroneous payments (see pp. 6–10, *supra*), and it is not the province of the judiciary to reverse that legislative policy judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
ROBERT E. KOPP,
DAVID M. COHEN,
Attorneys.

MARCH 1976.

APPENDIX

Statutes Involved

42 U.S.C. 1395g provides:

> The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) and prior to audit or settlement by the General Accounting Office, from the Federal Hospital Insurance Trust Fund, the amounts so determined, with necessary adjustments on account of previously made overpayments or underpayments; except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any period.

42 U.S.C. (Supp. IV) 1395cc(a)(1)(B) provides:

> (a)(1) Any provider of services (except a fund designated for purposes of section 1395f (g) and section 1395n(e) of this title) shall be qualified to participate under this subchapter and shall be eligible for payments under this subchapter if it files with the Secretary an agreement—
>
> * * * * *
>
> (B) not to charge any individual or any other person for items or services for which such individual is not entitled to have payment made under this subchapter because payment for expenses incurred for such items or services may

not be made by reason of the provisions of paragraph (1) or (9), but only if (i) such individual was without fault in incurring such expenses and (ii) the Secretary's determination that such payment may not be made for such items and services was made after the third year following the year in which notice of such payment was sent to such individual; except that the Secretary may reduce such three-year period to not less than one year if he finds such reduction is consistent with the objectives of this subchapter, * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1976